



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Kunz Construction Company, Inc.

File: B-234093

Date: March 30, 1989

DIGEST

1. Agency's determination to solicit for construction services contract on an unrestricted basis, rather than through a small business set-aside, is not an abuse of discretion where the requirement had no prior procurement history; the only construction requirement of similar scale within the previous 2 years had been bid upon by only one small business and was awarded at a price substantially lower than the contemplated contract; the decision was concurred in by small business specialists; and the agency was unaware of any actual small business interest.
2. Evidence of small business interest received after the solicitation was issued does not demonstrate the unreasonableness of the original determination or require that the solicitation be amended to restrict it to small business participation.

DECISION

Kunz Construction Company, Inc., protests the decision of the Army Corps of Engineers not to set aside exclusively for small business competition invitation for bids (IFB) No. DACA63-89-B-0041, for the construction of a depot warehouse at Kelly Air Force Base, Texas. Kunz contends that the contracting officer had sufficient expectation of small business interest to require a set-aside. We deny the protest.

The requirement for this procurement was advertised in the Commerce Business Daily (CBD) on November 7, 1988. On November 22, the IFB was issued on an unrestricted basis. By letter of December 16, Roy McGinnis & Co., Inc., a small business, protested the unrestricted status of the IFB to the agency, claiming that it should be issued as a total set aside for small business concerns. By letter of December 29, Kunz, also a small business, protested on the

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same grounds. The agency nevertheless proceeded with bid opening on January 5. Of 16 bids received, 5 were from small business firms, including McGinnis and Kunz. Spaw Glass Company, a large business, was the apparent low bidder at \$10,173,011, while Kunz was second low at \$10,426,000. On January 9, Kunz filed a protest with our Office, asserting again that the procurement should have been set aside for small businesses. No award has been made pending resolution of the protest.

Kunz claims that the contracting officer had sufficient knowledge of small business interest, both before and after issuing the solicitation, to have a reasonable expectation that bids would be received from at least two responsible small businesses, thereby requiring that the procurement be set aside for small businesses under the so-called "rule of two"; the Federal Acquisition Regulation (FAR) requires that contracts of this nature be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at a reasonable price. FAR § 19.502-2; T-L-C Systems, B-225496, Mar. 27, 1987, 87-1 CPD ¶ 354.

Specifically in this regard, Kunz contends that the Corps was well aware of a number of small businesses in the San Antonio area that regularly bid on projects of this size, as evidenced, Kunz states, by the contracting officer's sending of presolicitation announcements for this project to at least five small businesses, including Kunz. The Corps also was aware that these firms were interested in this requirement, Kunz argues, since all five sent in their payment for copies of the plans and specifications prior to issuance. Kunz claims that the agency was further made aware of small business interest by the two agency-level protests and a telephone conversation with the contracting officer during which McGinnis stated that a number of small businesses were interested in the procurement. Finally, Kunz points out that five small businesses did, in fact, bid on the procurement, that four of those five had been sent presolicitation announcements, and that all five were on the original bidding list of firms requesting plans and specifications.

The Corps maintains it had no expectation of sufficient small business interest at the time the set-aside decision was made, prior to the issuance of the solicitation, or after issuance. The Corps first explains that since there was no procurement history on this specific requirement, it called on the Small and Disadvantaged Business Utilization

Specialist (SADBUS) to review the overall procurement history of the area for the previous 2 years, and he found only one contract similar to the requirement at issue, at a price of \$13,643,742. Only one small business had bid on that contract, however, and since the contracting officer's working estimate for the current procurement was \$16,196,590, the SADBUS concluded that he could not support a determination that a reasonable expectation existed that at least two competitively priced bids from responsible businesses would be received. Hence, the SADBUS recommended that the solicitation be issued on an unrestricted basis, the contracting officer accepted that decision, and the Small Business Administration (SBA) procurement contracting representative concurred.

As for the presolicitation announcements, the Corps states that they were mailed to roughly 3,500 construction firms, both large and small, and that it was not aware of the size status of any in particular. Those firms had requested to be notified routinely of certain types of construction projects, and the mailing did not reflect any expectation by the contracting officer that the firms would actually bid. As to the bidders' list of firms requesting plans and specifications, the Corps claims that the responding firms were identified only as general contractors, without any indication of size status, and that, in any event, purchase of the plans would not necessarily provide an expectation that the firms would bid; the Corps notes that out of 44 firms that purchased plans and specifications, only 16 actually bid. As to the allegations of small business interest in the agency-level protests, the Corps found them insufficient to change its determination after the issuance of the solicitation.

The determination of whether there is a reasonable expectation that at least two small business concerns will compete at reasonable prices basically involves a business judgment within the broad discretion of contracting officials our review generally is limited to ascertaining whether the determination was reasonable. T-L-C Systems, B-225496, supra.

We find that the Corps' determination that a set-aside could not be justified was reasonable. In this regard, Kunz's allegation that the Corps was on actual notice of small business interest prior to issuance of the IFB appears baseless. There is no indication that the presolicitation mailing was any more than a response to the firms' requests to be routinely informed of such procurements; it has not been shown to reflect any knowledge by the Corps that certain firms were small, or any expectation that the firms

would actually bid. Similarly, there is no indication that the Corps was otherwise aware of the size status of any of the firms on the bidders list that had requested plans and specifications. Moreover, we have held that the mere presence of small businesses on the bidders' mailing list is not conclusive on the matter of sufficient small business interest, even where the agency is aware that they are small businesses. See Computer Tomography Repair Services, Inc., B-228050, Nov. 2, 1987, 87-2 CPD ¶ 428.

Where a requirement has no prior history, the contracting officer must nevertheless have some basis on which to make the judgment whether or not a set-aside is warranted, and we have held that prior related procurement history is an appropriate consideration in that respect, at least where, as here, the agency is not otherwise on notice of sufficient small business interest to require a set-aside. See J.M. Cashman, Inc., B-220560, Nov. 13, 1985, 85-2 CPD ¶ 554. The agency's reliance on the fact that only one small business bid on the only recent related construction procurement, and that the awarded price was substantially below the estimated cost for the present procurement, thus seems reasonable under the circumstances here. Furthermore, the decision was reviewed and concurred in by the SADBUS and the SBA representative, a factor to which we give great weight. Fayetteville Group Practice, Inc., 66 Comp. Gen. 489 (1987), 87-1 CPD ¶ 541.

Although after issuance of the solicitation the contracting officer became aware of the two small business protesters' interest in competing, we have held that information that first becomes available after issuance of a solicitation does not demonstrate the unreasonableness of the original determination not to set aside the procurement, or require that the solicitation be amended to create a set-aside. See Fayetteville Group Practice, Inc., supra. Similarly, the fact that five small businesses ultimately submitted bids is not relevant to a review of the propriety of the initial set-aside decision. Afghan Carpet Services, Inc., B-230638, June 24, 1988, 88-1 CPD ¶ 607.

The protest is denied.



James F. Hinchman
General Counsel